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IN THE

Supreme Court of the United States

October Term, 1960.

No. 513

ELEANOR ZIRIN, *Petitioner*,

v.

E. A. McGINNES, District Director of Internal Revenue,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Henry L. Schimpf. Jr., Esq., on behalf of the Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above matter on August 1, 1960.

OPINIONS BELOW.

No opinions filed in this cause have been reported as of the date of printing this Petition.

JURISDICTION.

The judgment of the United States Court of Appeals for the Third Circuit was made and entered on August 1, 1960. and a copy thereof is appended to this Petition in the Appendix at page 57. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED.

Petitioner was an employee of the Philadelphia office of the Internal Revenue Service, holding a Civil Service classification of GS-5. She was dismissed from her employment by the District Director on December 9, 1955, which dismissal was subsequently sustained by the Civil Service Commission. Petitioner sought injunctive relief against said dismissal, alleging that the District Director had no authority to dismiss, such power not having been delegated to him by the Secretary of the Treasury. The District Court granted a motion for summary judgment in favor of the District Director which judgment was reversed upon appeal by the United States Court of Appeals for the Third Circuit. Subsequently, on the District Director's petition for rehearing, the Appeal was reargued in order to enable the Circuit Court to hear and consider certain additional

matters not therefore offered by the District Director, and, after hearing, the Circuit Court reversed its earlier decision and affirmed the judgment entered by the District Court. The questions presented are:

1. Under the statutes and regulations, did the District Director of Internal Revenue have the requisite delegated authority from the Secretary of Treasury to separate or dismiss Petitioner from her civil service position within the Internal Revenue Service?

2. May the Circuit Court of Appeals, upon a rehearing, consider and base its decision upon items of evidentiary value which had not been presented or offered either to the District Court or the Circuit Court of Appeals at the time of original hearing?

STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED.

The pertinent portions of such statutes as are herein involved are set forth in the text.

The regulations involved, viz.: Reorganization Plan No. 26 of 1950; Extracts, Internal Revenue Manual, August 17th, 1954; RC-PHI-Memorandum No. 18-2, revised July 12th, 1955; Treasury Department Order No. 72; Treasury Department Order No. 120; Personnel Circular No. 109 (Revised); Treasury Department Order No. 150-27; Personnel Circular No. 109 (Revised), Supplement 5; Personnel Circular No. 109, Second Revision; are set forth in the Appendix (pp. 19-37).

STATEMENT.

The Petitioner was appointed to the position of clerk-typist on February 26, 1942 in the Department of Internal Revenue at Philadelphia, Pennsylvania at a salary of One thousand two hundred sixty dollars ($1,260.00) per annum. She was discharged from her employment in the Internal Revenue Service on December 9th, 1955 in a letter dated November 30, 1955 from E. A. McGinnes, District Director of Internal Revenue Service at Philadelphia, Pennsylvania. At the time of her discharge, she was classified as GS-5, Income Window Teller at a salary of Four thousand four hundred eighty dollars ($4,480.00) per annum.

The Petitioner received from the time of her appointment up to and including June 30, 1955 satisfactory or better performance ratings. On July 5, 1955, she received an unsigned letter from her immediate supervisor indicating that her services were unsatisfactory and unless her services were improved within ninety (90) days, she would be given a rating of unsatisfactory which could result in disciplinary action.

On November 2, 1955, the Petitioner received a letter from William F. Culliney, acting District Director of Internal Revenue Service at Philadelphia, Pennsylvania, indicating that she would be separated from the Service in not less than thirty (30) days for inefficiency. About November 8, 1955, she delivered to said E. A. McGinnes, District Director, her answer to said letter and the charges set forth therein.

On November 30, 1955, the Petitioner received a letter from E. A. McGinnes notifying her that she would be separated from the Service on December 9, 1955 and that she had a right to appeal within ten (10) days from receipt of the letter to the Regional Commissioner of Internal Revenue, Philadelphia, Pennsylvania.

On December 5, 1955, the Petitioner filed her appeal to the Performance Rating Board of Review which after hearings held on April 12 and 13 of 1956, sustained on April 13, 1956, the unsatisfactory rating of Petitioner. She appealed to the Regional Commissioner of Internal Revenue Service. On June 20, 1956, the Regional Commissioner of Internal Revenue Service denied her appeal. On June 28, 1956, the Petitioner further appealed to the Commissioner of Internal Revenue at Washington, D. C., requesting that the action of E. A. McGinnes, District Director, be reversed and on September 6, 1956, the Commissioner of Internal Revenue sustained the action of the District Director.

On October 29, 1956, the Petitioner filed her complaint in District Court of United States for the Eastern District of Pennsylvania against E. A. McGinnes, District Director of Internal Revenue and Stanley A. Niles, Chairman, Ira Herschberg and Joseph S. Bryan, members of the Performance Rating Board of Review of United States Internal Revenue Service for the 3rd Civil Service Region.

On December 19, 1956, the defendants in said suit filed a motion to dismiss the complaint. The District Court denied, on March 12, 1957, the motion to dismiss as to E. A. McGinnes, District Director of Internal Revenue, and granted the motion as to the defendants, Stanley A. Niles, Chairman, Ira Herschberg and Joseph S. Bryan, members of the Performance Rating Board of Review.

On March 11, 1957, Petitioner's motion for leave to amend Complaint was granted and an Amended Complaint was filed on April 30, 1957 in which she especially sought to have the Court order the District Director to reinstate her as a permanent civil service employee in the classification she had at the time of her separation.

On July 22, 1957, the Director of Internal Revenue filed a motion for summary judgment which was stayed pending an appeal by the Petitioner to the United States Civil Service Commission at Washington, D. C. and the Board of Appeals and Review, United States Civil Service Commission, Washington, D. C. which appeals were denied.

On September 17, 1958, the motion of the District Director of Internal Revenue for summary judgment was argued. The main contention of the Petitioner was that her separation or dismissal was unlawful because the District Director lacked the authority to separate or dismiss her. The District Director claimed that he had the authority under the Treasury Reorganization Plan No. 26 of 1950, 64 Stat. 1280 and the Treasury Department Order 150-27, June 26, 1953.

The District Court, Judge Welsh, held in construing Treasury Department Order 150-27 that while the Secretary of the Treasury did not specifically delegate his authority to dismiss, he delegated by implication his authority to dismiss or separate, therefore the Petitioner's dismissal or separation by the District Director was lawful in that he had the authority to do so. On October 30, 1958, the District Court granted the District Director's motion for summary judgment.

On December 8, 1958, the Petitioner filed notice of appeal to the United States Court of Appeals for the Third Circuit. The Circuit Court of Appeals, in opinion of the Court filed May 28, 1959, held that "the regulation is clear and unambiguous, and any extension of its terms by 'implication' would appear to be wholly unwarranted. The enumeration of specific powers to be delegated inexorably leads to the conclusion that it was intended that all other powers be excluded." The Court reversed the judgment of the District Court and remanded the cause for further proceedings, saying that "we hold, therefore, that the Treasury Reorganization Plan No. 26 and the regulations issued thereunder do not delegate to the District Director the authority to dismiss the appellant" and "once the appellee is enjoined from continuing his action pursuant to the illegal separation, appellant will have received all the relief requested."

On June 12, 1959, the District Director filed a Petition for rehearing in the Circuit Court of Appeals, setting forth

easury Department Order 72, October 10, 1946; Reor-
nization Plan No. 26 of 1950; Treasury Order No. 120,
ly 31, 1950; Personnel Circular No. 109 (Revised), March
, 1951; Treasury Department Order No. 150-27, June 26,
53; Personnel Circular No. 109 (Revised) Supplement 5,
ly 7, 1953, and Personnel Circular No. 109, Second Re-
sion, September 30, 1954. None of said orders or circu-
rs were relied upon by the District Director in his mo-
on for summary judgment either in the District Court or
e Circuit Court of Appeals with the exception of the
eorganization Plan No. 26 and Treasury Department Or-
r No. 150-27, June 26, 1953.

In his Petition for rehearing, the District Director
anged his position from that the Treasury Department
der No. 150-27 authorized him to dismiss the Petitioner
that the District Director had the authority to discharge
e Petitioner under certain other orders and circulars set
rth in the appendix to his petition.

The Circuit Court of Appeals granted reargument and
August 1, 1960, it filed an opinion in which it affirmed
e judgment of the District Court, however, his Honor,
rcuit Judge Kalodner filed a dissenting opinion.

Jurisdiction of the District Court in the first instance was
voked under the Act of 1912, 37 Stat. 555, 5 U. S. C. 652,
d the Administrative Procedure Act, 16 Stat. 243, §10, 5
S. C. 1009.

REASONS FOR GRANTING THE WRIT.

The Reorganization Act of 1949 (5 U. S. C. 133) gives
e President authority to reorganize the various executive
partments in such manner as he deemed necessary, sub-
t only to the requirement that any proposed reorganiza-
n plan first be submitted to Congress. If Congress did
t, by resolution of either house, disapprove said proposed
an within sixty days, it became effective.

Prior to the Reorganization Plan the authority of the Secretary of the Treasury to delegate his authority to dismiss employees of the Department was contained in Section 12 of the Act of Congress of August 2, 1946, 60 Stat. 809 (5 U. S. C. 22a).

The Reorganization Plan No. 26 of 1950 approved July 31, 1950 transferred to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department and on the same day the Secretary of the Treasury issued Treasury Department Order No. 120 as follows:

> "By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, it is directed that Officers, employees and agencies of the Treasury Department shall continue to perform the functions they were authorized to perform immediately prior to the effective date of the Reorganization Plan and authorized regulations and procedures in effect immediately prior to the effective date of the Reorganization Plan shall continue in effect until changed by appropriate authority."

On March 19, 1951 the Director of Personnel of the Treasury Department, with the approval of Administrative Assistant Secretary, issued Personnel Circular No. 109 (Revised) which directed that all removals or separations from the service required prior approval of the Department. Therefore, after that date, no head of any bureau had any authority to separate any one in his bureau from the service and further he could not delegate such authority to any subordinate.

On June 26, 1953, the Secretary of the Treasury issued Treasury Order No. 150-27 as follows:

> "By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, authority is hereby dele-

gated to the Commissioner of Internal Revenue to approve all personnel actions effecting appointments, reinstatements, promotions and transfers to positions in the Bureau of Internal Revenue except to the following: Deputy Commissioner, Assistant Commissioner.

The authority herein delegated to the Commissioner of Internal Revenue may be delegated by him to officials in the Bureau of Internal Revenue.

The Provisions of Personnel Circular No. 109 (Revised) dated March 19, 1951 are revised accordingly by this order."

In his petition for rehearing, the District Director set rth for the first time for consideration of the Circuit ourt, Personnel Circular No. 109 (Revised), Supplement 5, sued on July 7, 1953 by Director of Personnel and approved by the Administrative Assistant Secretary as follows:

"1. Heads of Bureaus are authorized to remove or separate employees for cause from positions to which they are authorized to approve appointments.

2. Section 4(a) of Personnel Order No. 109 (Revised), is hereby amended by striking out the subsection 'separations'."

The Personnel Circular No. 109 (Revised) Supplement 5 July 7, 1953, was not called to the attention of the District Court or the Court of Appeals until the District Director filed his petition for rehearing. However, the Circuit ourt of Appeals did, without considering said order, say, its opinion, filed May 28, 1959: "We hold, therefore, that e Treasury Reorganization Plan No. 26 and the regulaons issued thereunder do not delegate to the District Director the authority to dismiss the appellant. Appellee ints to no other statutory or regulatory authority granting the power of dismissal to the District Director, nor have e been able to discover any."

Therefore unless Personnel Circular No. 109 (Revised) Supplement 5 gives the Commissioner of Internal Revenue authority to dismiss employees in the Bureau of Internal Revenue, then he could not have dismissed the Petitioner and if he did not have such authority, his subordinate, the District Director, could not have had such authority.

The Secretary of the Treasury in Treasury Department Order No. 150-27 elected to deal directly with the authority of the head of one Bureau to wit; the Bureau of Internal Revenue. It gave the Commissioner authority to approve all personnel actions effecting appointments, reinstatements, promotions and transfers to positions in the Bureau of Internal Revenue except Deputy Commissioner and Assistant Commissioner. It also authorized the Commissioner to redelegate his authority to the officials in the Bureau of Internal Revenue. The question is: did Personnel Circular No. 109 (Revised) Supplement 5, issued by the Director of Personnel with the approval of the Administrative Assistant Secretary, authorizing the heads of Bureaus to remove or separate employees for cause from positions to which they were authorized to approve appointments, apply to the Internal Revenue Service and if so, did the Director of Personnel have authority to issue such directive, enlarging the authority given to the Commissioner of Internal Revenue by the Secretary of the Treasury eleven (11) days before?

The majority opinion of the Circuit Court of Appeals, after the reargument of the case, held that Director of Personnel had such authority, however, Judge Kalodner, in a dissenting opinion, said: "It is clear from the foregoing that the 1953 Personnel Circular, issued by the Director of Personnel eleven (11) days after the promulgation of Secretary Humphrey's 1953 Order, was an attempted usurpation of authority by a subordinate and its unauthorized 'Delegation' of dismissal powers to the District Director was invalid."

Secretary of the Treasury, John W. Snyder, in Treasury

)rder 72, issued October 10, 1946, delegated all authority ested in him to take final action on matters pertaining to lte employment of personnel in the Treasury Department o Director of Personnel, subject to approval of the Administrative Assistant to the Secretary.

Upon the approval of the Reorganization Plan No. 26, the Secretary of the Treasury issued Treasury Department Order No. 120 in which he directed that officers, employees nd agencies of the Treasury Department shall continue he functions they were authorized to perform prior to the Reorganization Plan until changed by appropriate authority.

The District Director contends that said order gave the Director of Personnel, with the approval of the Administrative Assistant Secretary, authority over employment and eparation of employees of the Treasury Department without any further action of the Secretary of the Treasury. The Director of Personnel, with the approval of the Administrative Assistant Secretary, issued Personnel Circular No. 109 (Revised) on March 19, 1951 in which he delegated o heads of bureaus authority to approve all personnel actions except those listed in paragraph four thereof and to edelegate this authority to subordinate officials and offices. This order did not authorize separations for cause without rior approval of the Department.

The Commissioner of Internal Revenue, under said Personnel Circular No. 109 (Revised), had the authority to pprove all personnel actions except those listed in paraaph four which, inter alia, excluded separations, and he ad the power to redelegate this authority to his subordiate officials and offices.

When the Secretary of the Treasury, in Treasury Order No. 150-27, issued June 26, 1953, delegated to the Commissioner of Internal Revenue (and not to any other heads of Bureaus) authority to approve all personnel appointments, einstatements and transfers in the Bureau of Internal Revnue except Deputy Commissioner and Assistant Commis-

sioner and to delegate such authority to officials of the Bureau of Internal Revenue, it must be presumed that the Secretary of the Treasury certainly did not intend to make a useless and unnecessary order but that such order contained all the authority to the Commissioner of Internal Revenue and his subordinates which the Secretary of the Treasury intended to give.

In respect to said order, the Circuit Court of Appeals in both opinions, said:

> "The regulation is clear and unambiguous and any extension of its terms by 'implication' would appear to be wholly unwarranted. The enumeration of specific powers to be delegated inexorably leads to the conclusion that it was intended that all other powers be excluded. *Iselin v. United States*, 270 U. S. 245."

In *Iselin v. United States*, 270 U. S. 245, it was held that the Court could not enlarge a statute where its language is plain and unambiguous, so that what was omitted presumably by inadvertence, may be included within its scope.

If the Secretary of the Treasury wanted the Commissioner of Internal Revenue and those under him to have authority to dismiss employees under them without prior approval of the Department, he could have included such authority of separation in his Order 150-27. Since he did not include any authority of separation in his Order, it must be presumed that he did not want to give to the Commissioner of Internal Revenue and those under him the authority of separation of employees without prior approval of the Department.

The Director of Personnel with the approval of the Administrative Assistant Secretary had authority to take action on matters pertaining to employment in the Treasury Department under Treasury Department Order 120 until changed by the appropriate authority. The appropriate authority was the Secretary of the Treasury.

When the Secretary of the Treasury issued a separate

Order No. 150-27 dealing with the authority of the Commissioner of Internal Revenue and said order appears complete, there is nothing before the Court which gave to the Director of Personnel any power to change and or enlarge the authority given by the Secretary of the Treasury to the Commissioner of Internal Revenue or his subordinate officials. The Director of Personnel had no power to change or enlarge the authority given to the Commissioner of Internal Revenue by the Secretary of the Treasury in his Order 150-27 and Personnel Circular No. 109 (Revised) Supplement 5 cannot do so.

If we assume for the purpose of argument that the Commissioner of Internal Revenue had authority to remove the Petitioner and could have delegated that authority, there does not appear from extracts of the Internal Revenue Manual, August 17, 1954 and the RC-PHI-Memorandum No. 13-2 Revised, July 12, 1955, set forth in the appendix hereof, as cited in the brief of the District Director upon the appeal to the Circuit Court of Appeals, any order or regulation authorizing the District Director to dismiss the Petitioner without prior clearance or approval, which was not obtained in this case.

In either event, the District Director had no authority to dismiss the Petitioner from the Internal Revenue Service.

The foregoing discussion has been directed to the basis of the decision of the Court of Appeals but nevertheless, it should be further noted that the Court did not consider whether Reorganization Plan No. 26 repealed and or rendered ineffective the Act of 1946, Public Law 600, and if Personnel Circulars 109 (Revised); 109 (Revised) Supplement 5 and 109 (Second Revision) mentioned herein, which refer to said Act of 1946 as partial authority therefor, were likewise ineffectual. The Reorganization Act of 1949 (5 U. S. C. 133) gave the President the right to reorganize the executive departments and this was done, insofar as the Treasury Department was concerned, by Reorganization Plan No. 26, transferring all authority and functions

of said Department to the Secretary of the Treasury. It therefore follows that all the authority of the Secretary to delegate his functions stems from Reorganization Plan No. 26.

The Secretary's Order (Treasury Department Order No. 120) issued on the date of approval of Reorganization Plan No. 26 conferred powers which were to be exercised until changed by appropriate authority. This was done by Treasury Department Order No. 150-27 delegating to the Commissioner of Internal Revenue authority to approve appointments, reinstatements and transfers in the Bureau.

The Director of Personnel has, nevertheless, issued Personnel Circular No. 109 (Revised) and Personnel Circular 109 (Revised) Supplement 5 (which purport to delegate to heads of all Bureaus the authority to approve appointments, and separate personnel over whom they have power of appointment), and as authority for issuing said Circular cites the Act of 1946 and Treasury Order No. 72 promulgated thereunder.

The District Director, in his Petition for rehearing (p. 3) states: "Prior to the Reorganization Plan, the authority of the Secretary of the Treasury to delegate his authority to dismiss employees of the Department was contained in Section 12 of the Act of August 2, 1946, 60 Stat. 809."

The approval of the Reorganization Plan 26 made ineffective the Act of 1946, being public law 600, 79th Congress and Treasury Department Order 72 and said Act and Order would not thereafter be the basis of any authority to the Director of Personnel with the approval of the Administrative Assistant Secretary for issuing any Personnel Circulars, nevertheless, the Director of Personnel with the approval of the Administrative Assistant Secretary issued on authority of said Act and Order, Personnel Circular No. 109 (Revised) and Personnel Circular No. 109 (Revised) Supplement 5. Said Personnel Circulars were ineffective and could confer no authority upon anyone. Since the Circuit Court of Appeals relied upon these Personnel Circulars in

reversing its prior decision and affirming the judgment of the District Court, an additional reason for granting this Petition is accordingly presented.

The Circuit Court of Appeals acted improperly in reversing its earlier decision at the rehearing of the cause by permitting the District Director to adduce new and additional items of an evidentiary nature not theretofore offered or considered in the proceedings. Specifically, the matter was ordered reargued after counsel for the District Director filed a Petition for rehearing, indicating that he had certain additional items in support of his motion for summary judgment which had not been presented, and called the attention of the Court to the existence of the Treasury Department Order No. 72, October 10, 1946; Treasury Department Order No. 120; Personnel Circular 109 Revised, and Supplement Five and Second Revision of said Circular.

It is important to note that the District Director contended that the basis of his authority to discharge the Petitioner was Treasury Order No. 150-27, June 26, 1953. It was only after the original appellate decision was handed down in favor of the Petitioner holding that the District Director had no authority under said Treasury Order, when, for the first time, the District Director completely changed his position and based his authority on Personnel Circular No. 109 (Revised) Supplement 5.

The Circuit Court erred in permitting the respondent to introduce such a facet of the case at this point, and overstepped the boundaries of judicial discretion in important aspects. It is submitted that this situation is not unlike that of *C.I.R. vs. Belridge Oil Company*, 267 F. 2nd 291 (9th Cir., 1959), wherein the Court refused to permit the government to stand on grounds on appeal which were not presented in the trial phase of the litigation. The Court stated: "One does not repudiate *Federal Crop Ins. Corp. vs. Merrill*, 332 U. S. 380, when one holds the government to its position intelligently taken in litigation. Private parties are

held to them and so is the government." In this connection, cf. also *General Utilities & Operating Co. v. Guy T. Helvering*, 296 U. S. 200, wherein this Court indicated to the Circuit Court that it should remand a matter to the trial court for determination of new matters not present in the record.

The statutory and regulatory material which respondent proffered at rehearing was noticed judicially by the Circuit Court of Appeals. Admittedly both the trial and appellate courts have the right to take judicial notice of statutes and, to a lesser extent, of regulations of governmental agencies. The process of judicial notice is, in the last analysis, one wherein evidentiary matters are made a part of the proceedings without the formality of proof. (Cf. Black's Law Dictionary, 3rd Ed., p. 1259.) Here the Court not only noticed the statute which the respondent urged was pertinent, but examined, considered and relied upon the Treasury Orders and other regulations allegedly issued pursuant to said statute. These regulations dealt with items of internal control and functioning of the Treasury Department, and thus were not within the accepted scope of judicial notice which, as applied to regulations of the principal departments of government is limited to those in which the public is interested and in respect to which they have a right to participate and by which they are to be controlled. (*Caha vs. U. S.*, 152 U. S. 211 at page 222; cf. also 20 *American Jurisprudence* 67, 68). This delineation by this Court has been disregarded by the Circuit Court.

It cannot be said that judicial notice of these regulations was proper within the scope of the *Federal Register Act*, 49 Stat. 501, 502, 44 U. S. C. 305, 307, which provides for publication of departmental orders and regulations and that ". . . The contents of the Federal Register may be judicially noticed, and, without prejudice to any other mode of citation, may be cited by volume and page number." Here there is no indication whatsoever, either in brief of counsel or the opinion of the Court, as to whether or not the

orders and regulations were published in the Federal Register, and whether they are accordingly entitled to be considered without formal proof.

Accordingly, it is submitted that the Circuit Court acted improperly in its consideration of respondent's additional material. Even if the material is ultimately subject to proper judicial notice, the District Court and not the Circuit Court is the proper place to establish this fact (cf. *Perlman vs. 322 W. 72d Street Co.*, 127 F. 2nd 716). The Circuit Court should not be permitted to base its decision on matters presented by brief and oral argument of counsel without any formality of proof and without such material having ever been adduced at any prior point in the proceedings.

A decision upon the questions involved in this case are important in the field of government employment and the District Director in his petition for rehearing before the Circuit Court of Appeals estimated that a large number of employees of the Internal Revenue Service would be affected by the decision in this case (cf. Pet. for Rehearing, P. 7).

In *Kendreck M. Cole, petitioner v. Philip Young, et al.*, 351 U. S. 536, a writ of certiorari was granted because of the importance of the questions in the field of Government employment.

In *William G. Barr, petitioner vs. Linda A. Matteo and John J. Madigan*, 355 U. S. 171, a writ of certiorari was granted to determine whether the absolute immunity from defamation suits accorded officials of the Government, with respect to acts done within the scope of their official authority, extends to statements to the press of high policy-making officers, below the Cabinet or of comparable rank, concerning matters committed by law to their control or supervision.

Both the federal government and the dismissed employees are presently in a position of uncertainty as to such employment status which cannot be resolved without the ultimate decision of this Court.

It is important in the field of government employment that it be decided whether the Reorganization Act of 1949 and any Reorganization Plan approved pursuant thereto have repealed or rendered ineffective the Act of 1946, Public Law 600 of 79th Congress and any department orders issued therein after the approval of the Reorganization Plan for such department which are based upon the authority of said Act of 1946.

Significant, too, is the problem herein presented as the scope of judicial notice, both as to the limits of discretion on an appellate level, and also as to the power of the federal courts in this regard with respect to an apparent distinction between departmental or agency regulations affecting the public interest and those concerning purely internal administrative and similar functions. Inasmuch as there is no definitive staute or precedent in this area, guidance from this Court is earnestly needed.

CONCLUSION.

For the reasons above cited, it is respectfully submitted that this Petition for a writ of certiorari should be granted.

Respectfully submitted,

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Philadelphia 7, Pa.,
Counsel for Petitioner.

APPENDIX.

EXTRACTS, INTERNAL REVENUE MANUAL, AUGUST 17, 1954

1800 RECRUITMENT, PLACEMENT, AND SEPARATION

1810 DELEGATIONS OF PERSONNEL AUTHORITY

1811 GENERAL PROVISIONS

1811.1 PURPOSE AND SCOPE

This section contains the specific delegations of authority within the Internal Revenue Service for effecting personnel actions and classifying positions, and states the limitations within which this authority will be exercised.

1811.2 LEGAL BASIS

Under the provisions of section 12, Public Law 600, 79th Congress and Reorganization Plan No. 26, 1950, the Secretary of the Treasury has delegated to the Commissioner full authority to take final action on certain personnel matters pertaining to the Internal Revenue Service. In addition, the Commissioner has been authorized to delegate his authority to subordinate officials and to authorize redelegation.

1811.3 AUTHORITY AND RESPONSIBILITY

(1) Under the provisions of Commissioner's Reorganization Order No. 18, dated July 8, 1953, and its amendments, the Assistant Commissioner (Administration) has authority to approve certain personnel actions and classify positions for which the Commissioner has classification authority. Pursuant to that order, the Assistant Commissioner (Administration) has redelegated his authority to the Director, Personnel and Training Division, Regional Commissioners, and the Chief, Processing Branch, to approve personnel actions as indicated in section 1814 below. Classifications authority has also been redelegated to the Director, Personnel and Training Division, and Regional Commissioners as indicated in section 1815 below.

(2) The personnel authority delegated to the Director, Personnel and Training Division, Regional Commissioners, and the Chief, Processing Branch may be redelegated to subordinate officials responsible for the personnel program. However, Regional Commissioners may not redelegate personnel action authority for positions of Chief, Personnel Branch, in District Directors' offices.

(3) The decentralization of personnel authority to the level of actual operation is consistent with the basic concept that the personnel program is one element in the overall job of management. It is essential, therefore, that delegations of personnel authority be redelegated to responsible officials as completely as possible depending upon local circumstances.

(4) Officials of the Internal Revenue Service who have been delegated personnel action and classification authority will be governed by existing legal requirements, applicable regulations of the Civil Service Commission, decisions of

e Comptroller General and directives issued by the reasury Department and the National Office.

312 CENTRALIZED POSITIONS

(1) The authority to approve and effect final personnel tions for appointments, position changes, and separations r the centralized positions is retained in the National ffice. No commitments or personnel actions involving ch positions will be made or taken by field officials with- t prior approval of the appropriate official in the Na- onal Office. Regional Commissioners and the Chief, Proc- sing Branch, will submit recommendations for personnel tions involving centralized positions under their juris- ction directly to the Director, Personnel and Training ivision, for necessary action. Regional Counsel will sub- it recommendations for personnel actions involving cen- alized positions directly to the Chief Counsel. The follow- g are considered centralized positions:

(a) *Regional Commissioners' Offices*

Regional Commissioner

Assistant Regional Commissioner

Executive Assistant to Assistant Regional Commissioner

Associate Chief and Assistant Chief, Appellate Division, and Special Assistant to Assistant Regional Commissioner (Appellate) (see paragraph (2) below)

Chief of Branch

Hearing Examiner, Supervisor in Charge, and Assistant Supervisor in Charge, Alcohol and Tobacco Tax

(b) *Regional Inspectors' Offices*

All positions grade GS-13 and above.

(c) *Regional Counsels' Offices*

All positions of attorney

All nonattorney positions grade GS-5 and above ex-

cept resignations of employees in clerical and administrative positions in grades GS-5 through GS-7.

(d) *District Directors' Offices*
District Director
Assistant District Director
Chief of Division
Assistant Chief of Division.

(e) *Processing Branch, Kansas City, Missouri*
Chief of Branch
Assistant Chief of Branch.

(2) Because individuals acting under temporary designations in positions of Associate Chief and Assistant Chief, Appellate Division, and Special Assistant to Assistant Regional Commissioner (Appellate) exercise authority to settle, for the Commissioner, certain contested tax cases, designations to these positions in an acting capacity also require the prior approval of the National Office.

1813 OTHER CENTRALIZED PERSONNEL ACTIONS

(1) The following personnel actions require the prior approval of the Treasury Department. Recommendations for these actions will be forwarded to the Director, Personnel and Training Division, or for Regional Counsel employees to the Chief Counsel, for necessary administrative action and submission to the Treasury Department.

(a) Employment of annuitants after optional or mandatory retirement.

(b) Continuance beyond retirement age.

(c) Detail or loan of an employee to or from an office outside the Internal Revenue Service.

(d) Retirements under Section 1(d), Public Law 879, 80th Congress.

(2) The Commissioner of Internal Revenue retains authority to recommend for the Secretary of the Treasury, employees to the Civil Service Commission for retirement under the provisions of section 1(d), Public Law 879, 80th Congress. All applications for such retirements will be forwarded to the Director, Personnel and Training Division, for necessary processing.

1814 DELEGATIONS OF PERSONNEL ACTION AUTHORITY

(1) Unless otherwise stated, the appointing officials listed in Column A below are authorized to approve and effect appointments, position changes, separations, and pay changes for the positions listed in Column B opposite each authorized official. In accordance with this authority, the Director, Personnel and Training Division, is responsible for processing and approving periodic and longevity step increases for all National Office employees including employees in the offices of the Chief Counsel. Regional Commissioners and the Chief, Processing Branch, are responsible for processing and approving step increases for themselves and employees under their jurisdiction including employees occupying positions centralized to the National Office. Also, Regional Commissioners are responsible for processing and approving step increases for all employees in offices of the Regional Counsel, including the Regional Counsel and those occupying positions centralized to the National Office.

RC-PHI-MEMORANDUM NO. 18-2, REVISED
JULY 12, 1955

U. S. TREASURY DEPARTMENT
Internal Revenue Service
Office of the Regional Commissioner
Philadelphia 7, Pa.

RC-PHI—Memorandum No. 18-2, Revised July 12, 1955

Delegation of Authority to Approve Personnel Actions

Section 1. Purpose

This memorandum redelegates authority to District Directors to approve and effect personnel actions and authorizes Assistant Regional Commissioners to approve personnel actions.

Section 2. Authority

Section 1810, Internal Revenue Manual.

Section 3. Delegation to District Directors

.01 Pursuant to authority delegated to the Regional Commissioner, authority is hereby redelegated to District Directors as indicated below:

1. To approve and effect appointments, position changes, separations and suspensions for all established positions for employees of their District Office with the

following exceptions and limitations: (The term "position change" as used in this paragraph includes personnel actions involving the reassignment and demotion of employees under the Performance Rating Program and as a result of Classification action.)

a. Personnel actions of any type involving movements *from* or *to* Group Supervisor positions and positions of Assistant Branch Chief and above require approval of the Regional Office, or the Regional and National Offices. (The term "personnel actions" as used in this subparagraph does *not* include actions where the only change is in job numbers or in posts of duty within a District.)

b. Suspension and removal of employees resulting from Administrative, Conduct, or Suitability type adverse actions in the case of incumbents occupying Group Supervisor positions and positions of Branch Chief and above will be effected by the Regional or National Office.

c. In suspensions over 15 days and removal of employees who have completed their probationary period and which resulted from Administrative, Conduct, or Suitability type adverse actions, or from actions taken under the Performance Rating Program, the proposed letter of suspension or removal requires prior clearance of the Regional Office in the case of incumbents of positions for which appointing authority has been delegated to District Offices.

d. Detail or loan (other than informal detail) of an employee to an Internal Revenue Service office outside the jurisdiction of the District requires Regional Office approval.

e. Actions listed below require prior approval of the Treasury Department (through the Regional and National Offices).

(1) Retirement under Section 1(d), Public Law 879, 80th Congress.

(2) Employment of annuitants after optional or mandatory retirement.

(3) Continuance beyond retirement age.

(4) Detail or loan of an employee to an office outside the Internal Revenue Service.

2. To issue official reprimands in writing to employees as a result of Administrative, Conduct and Suitability type adverse action cases except employees serving in Group Supervisor positions and positions of Branch Chief and above. In the latter instance reprimands will be issued by the Regional or National Office

3. To establish "additional identical" positions.

4. To process periodic and longevity step increases for all employees of the District Office, regardless of the grade or position.

5. To determine initial rates of pay upon effecting personnel actions, in accordance with the salary policy for the Internal Revenue Service, prescribed in IR-Mimeograph No. 54-91, Adm. No. 32, dated May 20, 1954. Exceptions to this salary policy require prior approval of the Regional Office.

Section 4. Further Redelegation of Authority within District Offices

Each District Director is authorized to further redelegate the authority granted above, in whole or in part. This includes authority to approve personnel actions by use of Standard Form 52 and to effect personnel actions by use of Standard Form 50, except that redelegation of authority to effect personnel actions by SF-50 shall be limited to the Chief, Administrative Division, or the Chief, Personnel Branch.

Section 5. Delegation to Assistant Regional Commissioners

.01 Assistant Regional Commissioners are hereby authorized to take action with respect to Regional Office employees in their respective divisions as indicated below.

1. Approve appointments, position changes and separations of employees involving actions to positions grade GS-12 and below with the following exceptions:

a. Supervisory positions, grade GS-11 and above.

b. Regional Analyst positions regardless of grade in the Collection and Audit Divisions.

2. Recommend for approval of the Regional Commissioner appointments, position changes and separations of employees involving actions to the following positions:

a. Supervisory positions, grades GS-11 and above.

b. Regional Analyst positions regardless of grade in the Collection and Audit Divisions.

c. Other non-supervisory positions, grade GS-13 and above.

3. Submit for recommendation of Regional Commissioner to the National Office, appointments, position changes and separations of employees involving movements *from* or *to* Branch Chief and above—this includes the positions of Associate Chief and Assistant Chief, Appellate Division, Special Assistant to the Assistant Regional Commissioner, Appellate, Hearing Examiner, Supervisor in Charge and Assistant Supervisor in Charge, Alcohol and Tobacco Tax. (National Office approval is not required where the action involves a change in post of duty within the Regional Office or for reassignments where the only change is in job number.)

.02 The authority delegated in paragraph 5.01 above is confined to the approval of actions on SF-52. The effectua-

tion of personnel actions by SF-50 is hereby delegated to the Assistant Regional Commissioner, Administration. This authority may be further redelegated to the Chief, Personnel Branch.

Section 6. General Provisions

.01 In exercising delegated authority defined herein, each District Director and Assistant Regional Commissioner shall be held responsible for the observance of pertinent legal requirements, Civil Service Rules and Regulations, personnel policies and procedures of the National and Regional Offices, and stipulated position and budget limitations.

.02 Personnel actions not included within the scope of authority delegated herein or any personnel action proposed in exception to personnel policies of the National Office or of this Region shall require prior approval of the Regional Personnel Branch.

Section 7. Effect on Other Documents

This memorandum supersedes RC-PHI-Memorandum No. 18-2, Revised, dated November 10, 1954 and Amendment No. 1, dated December 31, 1954.

Section 8. Inquiries and Effective Date

The provisions of this memorandum are effective immediately. Any inquiries regarding the authorities contained herein should be referred to the Regional Personnel Branch.

Charles R. Turner
Charles R. Turner
Regional Commissioner

Distribution: List No. 1333

Treasury Department Order 72.

THE SECRETARY OF THE TREASURY,
Washington, October 10, 1946.

By virtue of the authority vested in me as Secretary of the Treasury, and pursuant to the provisions of Public Law No. 600, 79th Congress, it is hereby ordered that:

(1) All authority vested in me to take final action on matters pertaining to the employment, direction, and general administration of personnel under the Treasury Department is delegated to the Director of Personnel who reports to me through the Administrative Assistant to the Secretary. Subject to the approval of the Administrative Assistant to the Secretary, the Director of Personnel may redelegate this authority to those officials and employees selected by him as being qualified to perform such duties.

(2) The authority vested in me by section 3828, Revised Statutes (44 U.S.C. 324), to authorize the publication of advertisements, notices or proposals is hereby delegated to the Director of Procurement.

(3) All authority vested in me to direct travel and all powers which I am authorized to delegate to a subordinate relating to the performance of travel by officials and employees on official business of the Department are hereby delegated to the Administrative Assistant to the Secretary.

(4) All other authority contained in Public Law 600, 79th Congress, which I am authorized to delegate to a subordinate official, and not covered in subparagraphs (1), (2) and (3), above, is hereby delegated to the Administrative Assistant to the Secretary.

The powers and authority delegated by subparagraphs (3) and (4), above, to the Administrative Assistant to the Secretary may be redelegated by him to officials and employees of the Department in such manner as he determines best for the efficient operation of the Treasury Department.

The Treasury officials and employees designated by the Administrative Assistant to the Secretary, and by the Director of Personnel with the approval of the Administrative Assistant to the Secretary, are hereby authorized to exercise the authority redelegated to them under the provisions of this Order.

(S) JOHN W. SNYDER,
Secretary of the Treasury.

Reorganization Plan No. 26 of 1950.

SECTION 1. *Transfer of functions to the Secretary.*—(a) Except as otherwise provided in subsection (b) of this section, and subject to the provisions of subsection (c) of this section, there are hereby transferred to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department.

* * * * * * * * *

Treasury Department Order No. 120.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, July 31, 1950.

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, it is directed that officers, employees, and agencies of the Treasury Department shall

continue to perform the functions they were authorized to perform immediately prior to the effective date of the Reorganization Plan, and authorized regulations and procedures in effect immediately prior to the effective date of the Reorganization Plan shall continue in effect until changed by the appropriate authority.

JOHN W. SNYDER,
Secretary of the Treasury.

Personnel Circular No. 109 (Revised).

TREASURY DEPARTMENT,
OFFICE OF PERSONNEL,
Washington, D. C., March 19, 1951.

To Heads of Bureaus, Treasury Department:

Subject: Delegation of Authority on Personnel Matters.

1. PURPOSE: This circular revises Personnel Circular No. 109 and Supplements and grants additional authority to Heads of Bureaus to approve personnel actions.

2. AUTHORITY: Section 12 of the Act of August 2, 1946 (Public Law No. 600, 79th Congress) and Treasury Order No. 72.

3. EXTENT OF DELEGATION: Heads of Bureaus are hereby delegated authority (a) to approve all personnel actions except those listed in paragraph 4 below, and (b) to redelegate this authority to subordinate officials and offices. A copy of each order of redelegation will be sent to the Director of Personnel.

4. EXCEPTIONS TO DELEGATED AUTHORITY: (a) All of the following personnel actions require prior approval of the Department:

ACCESSIONS

Appointments of non-preference eligibles when objections to preference eligibles passed over by bureaus have not been sustained by the Civil Service Commission.
Non-competitive appointment.
Reemployment of annuitant (Age 70 and over).

CHANGES

Continuance (beyond retirement age).
Superior accomplishment pay increase.

SEPARATIONS

Removal (except during probationary or trial period and for abandonment of position).
Involuntary retirement.

(b) The following personnel actions require prior approval of the Department when the positions involved are in grades GS-13 and above, or when the compensation is equivalent to those grades for positions not under the Classification Act:

ACCESSIONS

Appointments.
Reinstatements.

CHANGES

Administrative pay increase.
Extension of temporary appointments.
Intra-agency transfers.
Promotions (except promotion of the incumbent of a position which has been reallocated).
Reassignments (except reassignments which reflect a change in position number only).

(c) Attention is directed to the fact that a probational employee has a right of appeal under the Fair Employment Executive Order No. 9980. In the exercise of the authority delegated herein to remove an employee during proba-

tionary period, care should be taken to see that there is no element of discrimination involved in such removals.

5. PROCEDURE: Personnel actions requiring the prior approval of the Department will be submitted to the Director of Personnel together with personnel folders or other information necessary for the proper consideration of the actions. The request for approval may be in memorandum form or may be by submission of Form 50 or 52.

6. RETENTION OF AUTHORITY TO REVOKE: All or any part of the delegation of authority contained herein may be revoked at any time if a bureau fails to conform to existing laws, personnel policies, procedures, regulations or standards established by the Director of Personnel or the Civil Service Commission.

7. RESCISSION: This circular supersedes and rescinds Personnel Circular No. 109, dated March 18, 1947 and the accompanying chart, Supplement A, dated May 22, 1947, and Supplement B, dated December 15, 1947.

8. EFFECTIVE DATE: The provisions of this circular are effective immediately.

JAMES H. HARD,
Director of Personnel.

Approved:
WILLIAM W. PARSONS,
Administrative Assistant Secretary.

Treasury Department Order No. 150-27.

THE SECRETARY OF THE TREASURY,
Washington, June 26, 1953.

DELEGATION TO THE COMMISSIONER OF INTERNAL REVENUE OF AUTHORITY IN CONNECTION WITH PERSONNEL ACTIONS

By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, authority is hereby delegated to the Commissioner of Internal Revenue to approve all personnel actions effecting appointments, reinstatements, promotions and transfers to positions in the Bureau of Internal Revenue except to the following: Deputy Commissioner, Assistant Commissioner.

The authority herein delegated to the Commissioner of Internal Revenue may be redelegated by him to officials in the Bureau of Internal Revenue.

The provisions of Personnel Circular No. 109 (Revised) dated March 19, 1951, are revised accordingly by this Order.

(S) G. M. HUMPHREY,
Secretary of the Treasury.

Personnel Circular No. 109 (Revised), Supplement 5.

TREASURY DEPARTMENT,
OFFICE OF PERSONNEL,
Washington, D. C., July 7, 1953.

To Heads of Bureaus, Treasury Department:

Subject: Delegation of Authority to Approve Removals.

1. Heads of bureaus are authorized to remove or separate employees for cause from positions to which they are authorized to approve appointments.

2. Section 4(a) of Personnel Circular No. 109, Revised, is hereby amended by striking out the Subsection headed "SEPARATIONS".

JAMES H. HARD,
Director of Personnel.

Approved:
WILLIAM W. PARSONS,
Administrative Assistant Secretary.

Personnel Circular No. 109, Second Revision

TREASURY DEPARTMENT,
OFFICE OF PERSONNEL,
Washington, D. C., September 30, 1954.

To Heads of Bureaus, Treasury Department:

Subject: Delegation of Authority to Approve Personnel Actions.

1. PURPOSE: This circular contains the delegation of authority to Heads of Bureaus to approve personnel actions.

2. AUTHORITY: Section 12 of the Act of August 2, 1946 (Public Law No. 600, 79th Congress) and Treasury Orders Nos. 72, 150-27 and 181-2.

3. DELEGATION OF AUTHORITY: (a) Heads of Bureaus, other than the Commissioner of Internal Revenue, are hereby delegated authority to approve all personnel actions except those listed in Paragraphs 4(a) and 4(b) below.

(b) The Commissioner of Internal Revenue is hereby delegated authority to approve all personnel actions except those listed in Paragraphs 4(a) and 4(c) below.

(c) Heads of Bureaus may redelegate the above authorities to subordinate officials and offices. A copy of each order of redelegation must be sent to the Director of Personnel.

4. EXCEPTIONS TO DELEGATED AUTHORITY: (a) The following personnel actions require prior approval of the Department:

ACCESSIONS

Employment of annuitant after optional or mandatory retirement.

CHANGES

Continuance (beyond retirement age).

(b) The following personnel actions require prior approval of the Department when the positions involved are in grades GS-13 and above, except for the Reconstruction Finance and Federal Facilities Corporations which shall be grades GS-16 and above, or when the compensation is equivalent to those grades for positions not under the Classification Act:

ACCESSIONS

All accession actions.

CHANGES

Administrative pay increase (except those granted pursuant to an administrative pay plan approved by the Department).

Promotion (except promotion of the incumbent of a position which has been regraded).

Reassignments (except reassignments which reflect a change in position number only).

(c) Prior approval of the Department is required for a personnel action which results in filling one of the following positions in the Internal Revenue Service: Deputy Commissioner, Assistant Commissioner.

5. PROCEDURE: Submit personnel actions requiring the prior approval of the Department to the Director of Personnel together with personnel folders or other information necessary for the proper consideration of the actions. The request for approval may be in memorandum form or may be by submission of Form 50 or 52.

6. RETENTION OF AUTHORITY TO REVOKE: All or any part of the delegation of authority contained herein may be revoked at any time if a bureau fails to conform to existing laws, personnel policies, procedures, regulations or standards established by the Director of Personnel or the Civil Service Commission.

(S) JOSEPH A. JORDAN,
Acting Director of Personnel.

Approved:

(S) WILLIAM W. PARSONS,
Administrative Assistant Secretary.

Index Listing: Appointments, Delegations of Authority, Removals, Retirement.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,812

ELEANOR ZIRIN,

Appellant,

v.

E. A. McGINNES, District Director of Internal Revenue.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued April 9, 1959.

Before McLAUGHLIN, KALODNER and STALEY, *Circuit Judges.*

OPINION OF THE COURT.

(Filed May 28, 1959.)

By STALEY, *Circuit Judge.*

The principal question raised on this appeal is whether the District Director of Internal Revenue had authority to discharge an employee of the department.

Appellant, Eleanor Zirin, was dismissed from government employ by the District Director, Philadelphia, Pennsylvania, (appellee) by letter of November 30, 1955, separation to be effective at the close of business December 9, 1955. Appellant was originally appointed to the position of clerk-typist on February 16, 1942, and at the time of her discharge was classified as GS-5, Income Window Telier. On July 5, 1955, she received a letter from her immediate superior indicating that her services were unsatisfactory and that unless corrected within ninety days she would be given an unsatisfactory rating which could result in disciplinary action. The following day appellant acknowledged acceptance of this ninety-day warning letter.

On November 2, 1955, appellant received a subsequent communication from the Acting District Director advising her that her performance rating was unsatisfactory, specifying particulars, and indicating that she was to be separated in not less than thirty days. Within a week appellant answered the charges set forth in the November 2nd letter. Thereafter, on November 30, 1955, appellee notified appellant that her separation was to be effective, December 9, 1955, and that she had a right to appeal within ten days of receipt of the letter. Accordingly, on December 5, 1955, she appealed to the Performance Rating Board of Review which, held extensive hearings on April 12 and 13, 1956

That Board sustained the unsatisfactory rating. Subsequently, appellant appealed her dismissal, without success, to the Regional Commissioner of Internal Revenue, Philadelphia, and the Commissioner of Internal Revenue, Washington.

On October 29, 1956, she filed a complaint in the United States District Court for the Eastern District of Pennsylvania, which was amended on April 30, 1957. The appellee filed a motion for summary judgment, and after argument the court by order dated December 31, 1957, stayed all proceedings pending further administrative appeals. Appeals to the United States Civil Service Commission and the Board of Appeals and Review, United States Civil Service Commission, followed and were likewise denied. Thereafter, the case came on for hearing in the district court upon appellee's motion for summary judgment. The motion was ultimately granted by order dated October 30, 1958.

Appellant's main contention is that her separation or dismissal was unlawful inasmuch as the appellee lacked the authority to separate or dismiss her. She asserts that the district court erred when it found that the Secretary of the Treasury implicitly delegated authority to the Commissioner of Internal Revenue to separate or dismiss employees of the Internal Revenue Service.

The appellee does not attempt in his brief to meet this issue but merely submits that as the employee was afforded all the procedures required by statute, the court will not review the merits of the dismissal.

Our consideration of the problem of lack of authority requires a study of the Treasury Reorganization Plan and the delegations thereunder. Treasury Reorganization Plan No. 26 of 1950, 64 Stat. 1280,[1] transferred to the Secretary

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[1] "Section 1. **Transfer of functions to the Secretary.**

"(a) Except as otherwise provided in subsection (b) of this section and subject to the provisions of subsection (c) of this section [neither of which is here relevant], there are hereby transferred to the Secretary of the Treasury all functions of all other officers of the Department

of the Treasury the function of separating or dismissing an employee of the Internal Revenue Service, one of the departments of the Treasury. The narrow issue in the case is, therefore, the extent to which that power was delegated to subordinate officials and ultimately to the district directors.

The district court relied upon Treasury Department Order No. 150-27, June 26, 1953. In pertinent part that order delegates to the Commissioner of Internal Revenue authority "to approve all personnel actions effecting appointments, reinstatements, promotions and transfers to positions in the Bureau of Internal Revenue except the following: Deputy Commissioner, Assistant Commissioner."[1] Although this order admittedly does not specifically delegate the authority to dismiss, it has been urged that the power was delegated by implication. The regulation is clear and unambiguous, and any extension of its terms by "implication" would appear to be wholly unwarranted. The enumeration of specific powers to be delegated inexorably leads to the conclusion that it was intended that all other powers be excluded. As Justice Brandeis states in Iselin v. United States, 270 U. S. 245, 251 (1926), "What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included

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the Treasury and all functions of all agencies and employees of such Department.

"Section 2. **Performance of functions of Secretary.**

"The Secretary of the Treasury may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee of the Department of the Treasury of any function of the Secretary [omitted] any function transferred to the Secretary by the provisions of this reorganization plan."

[1] This authority was successively redelegated to the Assistant Commissioner (Administration) in Commissioner's Reorganization Order No. 18, Rev. 6, 1953, to Regional Commissioners in Internal Revenue Manual, August 17, 1954, to District Directors of Internal Revenue, RC-FHI—Memorandum No. 18.2, Revised July 12, 1955.

within its scope. To supply omissions transcends the judicial function."

It is not even altogether clear whether the omission of the power of dismissal was inadvertent. The district court concluded that such must be the case from the fact that the power of reinstatement was delegated. However, we do not see how this necessarily follows, for it is equally rational to suppose that it was intended that review of the facts leading to a possible reinstatement, in accordance with prescribed regulatory procedures, would be delegated but initial dismissal power would be retained at the Secretarial level.[3] We hold, therefore, that Treasury Reorganization Plan No. 26 and the regulations issued thereunder do not delegate to the District Director the authority to dismiss the appellant.

Appellee points to no other statutory or regulatory authority granting the power of dismissal to the District Director nor have we been able to discover any. The cases cited by the appellee are inapposite for they merely indicate that where separation of an employee is effected in accordance with statutory requirements the courts will not inquire into the dismissal. In the instant case the separation was beyond the delegated authority of the appellee and therefore void.

Since we conclude that the dismissal of employees was beyond the power of the District Director here involved, the extensive hearing and administrative appeals that followed could have no curative effect. They were meaningless and as much a nullity as the separation itself.

Appellee does raise one other issue that deserves consideration, for he contends that the relief sought[4] by appel-

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[3] The Treasury Department Regulations and Orders make it perfectly clear that when it was desired to indicate delegation of authority to separate from service (dismissal), it was mentioned explicitly.

[4] The amended complaint, which was filed on April 30, 1957, seeks relief as follows:

(a) That the district court hear the action de novo

lant is beyond the power of the district court to grant. It is argued that since appellant's suit contemplates affirmative action, in the nature of a mandatory injunction, it is in effect a suit for mandamus and as such cannot be entertained by the district court.

This analysis tends to over-simplify what is an admittedly difficult area of the law. It is true that the complaint is inartfully drawn, but we are not bound by technical rules of pleading and are required to inquire into what relief is actually sought. If the relief sought is a court order controlling executive officers of the government with respect to the exercise of powers vested in them by statute, it could not be granted because the government has not consented to the suit, has not been made a party, and also because the district court is without power to grant a writ of mandamus or a mandatory injunction to like effect. Updegraff v. Talbott, 221 F. 2d 342 (C. A. 4, 1955). However, such is not this case. Here the appellee has committed an *ultra vires* act, and an injunction may be properly framed to substantially accomplish what the appellant desires; i. e., recognition that she was never legally separated. Noble v. Union River Logging R. R. Co., 147 U. S. 165 (1893); Board of Liquidation v. McComb, 92 U. S. 531 (1875). Nor need such an order go as far as that issued in Wilson v. Bowers, 14 F. 2d 976, 977 (S. D. N. Y. 1924). Judge Augustus Hand

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(b) That the rights of the parties in the premises be adjudicated

(c) That a provisional or preliminary injunction be issued ordering and directing the defendant (appellee), his agents, assistants, deputies, servants specifically until a final hearing, to reinstate said plaintiff as a permanent civil service employee in the same classification as she had at the time of her separation, with full rights earned by her under civil service as of the time of her separation.

(d) That upon a final hearing the preliminary injunction be made permanent.

(e) That the action of the defendant be reversed and set aside as unlawful and improper and that said defendant be ordered and directed to reinstate said plaintiff as a permanent civil service employee in the same classification as she had at the time of her separation.

(f) That the court grant such other and further relief in the premises as the court deems just and equitable.

indicated "there probably is a distinction * * * between an application for a mandamus requiring an official in general to take certain action and an injunction restraining his refusal upon some particular ground which he sets up as a consideration legally controlling * * *." Also see Perkins v. Elg, 307 U. S. 325 (1939); Gibson Howell Co. v. Helvering, 80 F. 2d 592 (C. A. 3, 1935); Swanson Chemical Corp. v. Doran, 41 F. 2d 784 (E. D. Pa. 1929); Casper v. Doran, 30 F. 2d 400 (E. D. Pa. 1929), affirmed, 41 F. 2d 994 (C. A. 3, 1930) and Carnioid v. Blair, 15 F. 2d 56 (S. D. N. Y. 1926). In the instant case the appellant is entitled to an injunction to restrain the appellee from continuing to act in pursuance of the illegal separation. The law is settled that if a federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred, equity has jurisdiction to restrain him. State of Colorado v. Toll, 268 U. S. 228 (1925); American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902); and Harper v. Jones, 195 F. 2d 705 (C. A. 10), cert. denied, 344 U. S. 821 (1952).

We need not concern ourselves unduly with the question of whether the Secretary of the Treasury or Commissioner of Internal Revenue were indispensable parties. In Williams v. Fanning, 332 U. S. 490, 494 (1947), the test as to whether a superior official can be dispensed with as a party was stated to be whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." Accord, Hynes v. Grimes Packing Co., 337 U. S. 86 (1949); State of Colorado v. Toll, 268 U. S. 228 (1925); Jeffries v. Olesen, 121 F. Supp. 463 (S. D. Calif. 1954). Once the appellee is enjoined from continuing his action pursuant to the illegal separation, appellant will have received all the relief requested.

The judgment of the district court will be reversed and the cause remanded for further proceedings in accordance with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

No. 12,812.

ELEANOR ZIRIN,

Appellant,

v.

E. A. McGINNES, Director of Internal Revenue.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued April 9, 1959.
Reargued January 4, 1960
Reargued en banc June 20, 1960.
Before BIGGS, *Chief Judge*, GOODRICH, McLAUGHLIN, KALODNER, STALEY, HASTIE and FORMAN, *Circuit Judges*.

OPINION OF THE COURT.

(Filed August 1, 1960.)

By STALEY, *Circuit Judge.*

We granted reargument in this case inasmuch as the government presented new and significant material in its petition for rehearing which affects the outcome of this controversy.[1]

The principal question raised on this appeal is whether the District Director of Internal Revenue had authority to discharge an employee of the department.

Appellant, Eleanor Zirin, was dismissed from government employ by the District Director, Philadelphia, Pennsylvania, (appellee) by letter of November 30, 1955, separation to be effective at the close of business December 9, 1955. Appellant was originally appointed to the position of clerk-typist on February 16, 1942, and at the time of her discharge was classified as GS-5, Income Window Teller. On July 5, 1955, she received a letter from her immediate superior, indicating that her services were unsatisfactory and that unless corrected within ninety days she would be given an unsatisfactory rating which could result in disciplinary action. The following day appellant acknowledged acceptance of this ninety-day warning letter.

On November 2, 1955, appellant received a subsequent communication from the Acting District Director advising her that her performance rating was unsatisfactory, specifying particulars, and indicating that she was to be separated in not less than thirty days. Within a week appellant answered the charges set forth in the November 2nd letter.

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[1] Pursuant to an order of court issued January 8, 1960, we also granted authority to Amram, Hahn & Sundlun, attorneys for the plaintiff in Everett v. United States, No. 270-57, a cause then pending in the United States Court of Claims, to submit a brief herein as amici curiae

Thereafter, on November 21, 1955, appellee notified appellant that her separation was to be effective December 9, 1955, and that she had a right to appeal within ten days of receipt of the letter. Accordingly, on December 5, 1955, she appealed to the Performance Rating Board of Review which held extensive hearings on April 12 and 13, 1956. That Board sustained the unsatisfactory rating. Subsequently, appellant appealed her dismissal, without success, to the Regional Commissioner of Internal Revenue, Philadelphia, and the Commissioner of Internal Revenue, Washington.

On October 29, 1956, she filed a complaint in the United States District Court for the Eastern District of Pennsylvania, which was amended on April 30, 1957. The appellee filed a motion for summary judgment, and after argument the court by order dated December 31, 1957, stayed all proceedings pending further administrative appeals. Appeals to the United States Civil Service Commission and the Board of Appeals and Review, United States Civil Service Commission, followed and were likewise denied. Thereafter, the case came on for hearing in the district court upon appellee's motion for summary judgment. The motion was ultimately granted by order dated October 30, 1958.

At the threshold the government contends that the relief sought by appellant is beyond the power of the district court to grant. It is argued that since appellant's suit contemplates affirmative action, in the nature of a mandatory injunction, it is in effect a suit for mandamus and as such cannot be entertained by the district court.

This analysis tends to over-simplify what is an admittedly difficult area of the law. It is true that the complaint is unartfully drawn, but we are not bound by technical rules of pleading and are required to inquire into what relief is actually sought. If the relief sought is a court order controlling executive officers of the government with respect to the exercise of powers vested in them by

statute, it could not be granted because the government has not consented to the suit, has not been made a party, and also because the district court is without power to grant a writ of mandamus or a mandatory injunction to like effect. Updegraff v. Talbott, 221 F. 2d 342 (C. A. 4, 1955). However, such is not this case. Here the appellee is alleged to have committed an *ultra vires* act, and an injunction may be properly framed to substantially accomplish what the appellant desires, i.e., recognition that she was never legally separated. Noble v. Union River Logging R. R. Co., 147 U. S. 165 (1893); Board of Liquidation v. McComb, 92 U. S. 531 (1875). Nor need such an order go as far as that issued in Wilson v. Bowers, 14 F. 2d 976, 977 (S. D. N. Y. 1924). Judge Augustus Hand indicated "there probably is a distinction * * * between an application for a mandamus requiring an official in general to take certain action and an injunction restraining his refusal upon some particular ground which he sets up as a consideration legally controlling * * *." Also see Perkins v. Elg, 307 U. S. 325 (1939); Gibson Howell Co. v. Helvering, 80 F. 2d 592 (C. A. 3, 1935); Swanson Chemical Corp. v. Doran, 41 F. 2d 784 (E. D. Pa. 1929); Casper v. Doran, 30 F. 2d 400 (E. D. Pa. 1929), affirmed, 41 F. 2d 994 (C. A. 3, 1930); and Carnioid v. Blair, 15 F. 2d 56 (S. D. N. Y. 1926). In the instant case the appellant may be entitled to an injunction to restrain the appellee from continuing to act in pursuance of the illegal separation. The law is settled that if a federal officer does or attempts to do acts which are in excess of his authority or under authority not validly conferred, equity has jurisdiction to restrain him. State of Colorado v. Toll, 268 U. S. 228 (1925); American School of Magnetic Healing v. McAnnulty, 187 U. S. 94 (1902); and Harper v. Jones, 195 F. 2d 767 (C. A. 10), cert. denied, 344 U. S. 821 (1952).

We need not concern ourselves unduly at this time with the question of whether the Secretary of the Treasury or Commissioner of Internal Revenue were indispensable parties. In Williams v. Fanning, 332 U. S. 490, 494 (1947),

the test as to whether a superior official can be dispensed with as a party was stated to be whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." Accord, Hynes v. Grimes Packing Co., 337 U. S. 86 (1949); State of Colorado v. Toll, 268 U. S. 228 (1925); Jeffries v. Olesen, 121 F. Supp. 463 (S. D. Calif. 1954). Once the appellee has been enjoined from continuing his action pursuant to an illegal separation, appellant will have received all the relief requested.

If we conclude that the dismissal of employees was beyond the power of the District Director here involved, the extensive hearing and administrative appeals that followed could have no curative effect. They were meaningless and as much a nullity as the separation itself.

Appellant's main contention is that her separation or dismissal was unlawful inasmuch as the appellee lacked the authority to separate or dismiss her. The government takes issue with this contention and asserts that the District Director had ample authority to discharge the appellant.

Our consideration of the problem of authority requires a study of the Treasury Reorganization Plan and the various delegations thereunder. Treasury Reorganization Plan No. 26 of 1950, 64 Stat. 1280 [2] transferred to the Secretary of the Treasury the function of separating or dismissing an

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[2] "Section 1. **Transfer of functions to the Secretary.**

"(a) Except as otherwise provided in subsection (b) of this section and subject to the provisions of subsection (c) of this section [neither of which is here relevant], there are hereby transferred to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department.

"Section 2. **Performance of functions of Secretary.**

"The Secretary of the Treasury may from time to time make such provisions as he shall deem appropriate authorizing the performance by any other officer, or by any agency or employee, of the Department of the Treasury of any function of the Secretary, including any function transferred to the Secretary by the provisions of this reorganization plan."

employee of the Internal Revenue Service, one of the departments of the Treasury. The narrow issue in the case is, therefore, the extent to which that power was delegated to subordinate officials and ultimately to the district director.

The district court relied upon Treasury Department Order No. 150-27, June 26, 1953. In pertinent part that order delegates to the Commissioner of Internal Revenue authority "to approve all personnel actions effecting appointments, reinstatements, promotions and transfers to positions in the Bureau of Internal Revenue except the following: Deputy Commissioner, Assistant Commissioner."[3] Although this order admittedly does not specifically delegate the authority to dismiss, the government urged and the district court concluded that the power was delegated by implication. The regulation is clear and unambiguous, and any extension of its terms by "implication" would appear to be wholly unwarranted. The enumeration of specific powers to be delegated inexorably leads to the conclusion that it was intended that all other powers be excluded. Iselin v. United States, 270 U. S. 245 (1926). We hold, therefore, that Treasury Department Order No. 150-27 and the regulations issued thereunder do not delegate to the District Director the authority to dismiss the appellant.

In its petition for reargument the government did not question the above interpretation of Treasury Department Order No. 150-27, but rather brought to the court's attention another series of delegations which is alleged to provide authority for the contested action of the District Director.

As we have previously noted, the Treasury Reorgani-

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[3] This authority was successively redelegated to the Assistant Commissioner (Administration) in Commissioner's Reorganization Order No. 18, July 8, 1953, to Regional Commissioners in Internal Revenue Manual, August 17, 1954, to District Directors of Internal Revenue, RC PHI—Memorandum No. 18-2, Revised, July 12, 1955.

zation Plan, effective July 31, 1950, transferred dismissal authority to the Secretary of the Treasury. Section 2 of the Act also authorized redelegations of authority by the Secretary to subordinate officials of the department. By Treasury Department Order No. 120, dated July 31, 1950, the Secretary directed that officers of the Treasury Department "* * * continue to perform the functions they were authorized to perform immediately prior to the effective date of the Reorganization Plan * * *."

Prior to the Reorganization Plan the Secretary had delegated to the Director of Personnel, one of his immediate subordinates, "All authority vested in [the Secretary] to take final action on matters pertaining to the employment, direction, and general administration of personnel under the Treasury Department * * *" Treasury Department Order No. 72, dated October 10, 1946. In addition, the order contained redelegation authority. Pursuant to the authority granted in this order, the Director of Personnel issued Personnel Circular No. 109 (Revised) on March 19, 1951. Some redelegations to Heads of Bureaus were contained therein but specifically excepted was the power of dismissal. It was during the period that this circular was in effect, on June 26, 1953, that Treasury Department Order No. 150-27 was issued. Although similar in many particulars, Order No. 150-27 grants broader authority to the Commissioner in one respect; i.e., personnel actions involving employees in grade GS-13 and above, with the express exception of the Deputy Commissioner and the Assistant Commissioner.

Shortly thereafter, on July 7, 1953, Supplement No. 5 to Personnel Circular No. 109 was issued by the Director of Personnel. Supplement No. 5 provided that henceforth Heads of Bureaus were authorized "* * * to remove or separate employees for cause from positions to which they [Heads of Bureaus] are authorized to approve appointments." Inasmuch as the then effective revision of Personnel Circular No. 109 included the authority to appoint employees (with exceptions not relevant here), the sup-

plement, if it is applicable to the Commissioner of Internal Revenue, authorized removal of employees for cause.

The appellant asserts it is not applicable, placing primary reliance on Gmo. Niehaus & Co. v. United States, 170 F. Supp. 419, decided by the Court of Claims on February 11, 1959. That case dealt with the First War Powers Act, 1941, which amended the Trading with the Enemy Act, vesting enemy property when, as and upon the terms, directed by the President, in such agency or person as may be from time to time designated by the President. These powers were delegated to the Alien Property Custodian in a broad executive order that transferred all the authority the President had been given. The authority was in 1946 transferred to the Attorney General but no change in the vesting power was made. Thereafter, on July 9, 1951, the President wrote identical letters to the Vice President, as President of the Senate, and to the Speaker of the House of Representatives asking for legislation terminating the state of war between the United States and Germany but preserving the vesting power as regards property of Germans which was acquired by them before January 1, 1947. The letter contained the following paragraph:

> "Furthermore, it is not intended that the termination of the state of war shall in any way change or alter the program, which Congress has authorized, of seizing under the Trading with the Enemy Act, German property in this country on or before December 31, 1946, and using the proceeds to pay just and legitimate claims arising from the war in accordance with the War Claims Act of 1948. The vesting of German property under this program does not extend to property acquired since the resumption of trade with Germany on January 1, 1947, following the cessation of hostilities. It is limited to German property and rights located here before or during the period of hostilities."

Six months later the Assistant Attorney General issued the vesting order in that case upon property which it was

alleged was acquired by the German plaintiffs after December 31, 1946. The Court of Claims held the President was entrusted with the vesting power and since he had formally stated to Congress that property such as that in question was not subject to vesting it was simply not subject to vesting. "Any misunderstanding by the President's subordinates, and any action later taken by them in contradiction of the President's expressed determination, could not affect the President's power to make the determination, nor the consequences of its having been made." 170 F. Supp. at page 422.

However that may be, the Niehaus case is far removed from the facts of the instant appeal. There the President withdrew the very power that the Attorney General later attempted to exercise. In the instant case, appellant asks us to reason that since the Secretary of the Treasury in Order No. 150-27 failed to grant the Commissioner of Internal Revenue the power of dismissal he impliedly withdrew that power from the Director of Personnel. The Niehaus reasoning does not take one that far, and we are unwilling to subscribe to that principle. The Order granted specific powers to the Commissioner, and as to those powers we would infer a withdrawal of authority from the Director of Personnel; however, we fail to see how a failure to grant certain powers to the Commissioner, impliedly revokes the powers already vested in the Director and not specifically withdrawn. In fact, this very order provides explicitly that "The provisions of Personnel Circular No. 109 (Revised) dated March 19, 1951, are revised accordingly by this Order." It seems clear to us that the effect of this provision was to reaffirm the powers theretofore given by the Secretary to the Director of Personnel, except for the powers explicitly granted to the Commissioner of Internal Revenue under this Order.

Appellant does raise one other issue deserving of consideration. She contends that a judicial tribunal has the right to review administrative action to inquire whether

an individual's procedural rights have been safeguarded. However this may be, the appellant overlooks the fact that the present action is instituted only against E. A. McGinnes, the District Director of Internal Revenue. The individual members of the Civil Service Commission, the body to which the dismissal was appealed, have not been made parties to this action. We had occasion to consider a similar problem in the recent case of Adamietz v. Smith, 273 F. 2d 385 (C. A. 3, 1960), wherein we explicitly held that the members of the Commission were indispensable parties. The cases cited therein completely dispose of this aspect of the case.

The judgment will be affirmed.

KALODNER, *Circuit Judge*, dissenting

I agree with the majority's holding ". . . that Treasury Department Order No. 150-27 and the regulations issued thereunder do not delegate to the District Director the authority to dismiss the appellant."

In my opinion the holding stated is dispositive of this appeal and requires reversal of the judgment of the District Court which was premised on a contrary view.

Treasury Department Order No. 150-27, issued June 26, 1953 by Secretary of the Treasury George M. Humphrey, clearly did not include express authority to the District Director to dismiss, remove or separate an Internal Revenue employee, such as the appellant here. Cognizant of that fact, the District Director, in the instant case, urges that Personnel Circular 109 (Revised), Supplement 5, issued by the Treasury Department Director of Personnel on July 7, 1953—eleven days subsequent to Order No. 150-27—delegated to the District Director authority to dismiss his employees. The District Director says that the Director of Personnel was authorized to issue Personnel Circular No. 109 pursuant to the terms of Treasury Department Order

No. 120, effective July 31, 1950 and Treasury Department Order No. 72, effective October 10, 1946, both promulgated by Secretary of the Treasury John W. Snyder.

The majority subscribes to the District Director's contention and bases its affirmance of the District Court's judgment on that subscription.

I disagree with the majority's view in this respect.

The District Director's resort to the 1946 and 1950 Treasury Department Orders in an attempt to give validity to Personnel Circular No. 109 issued eleven days after the 1953 Treasury Department Order, is an obvious "bootstrap" operation which cannot be countenanced.

It is true that the 1946 Treasury Department Order, delegated to the Director of Personnel "all authority vested in me to take final action on matters pertaining to the employment, direction and general administration of personnel under the Treasury Department." It is also true that the 1950 Treasury Department Order provided that all officers, employees, and agencies of the Treasury Department "shall continue to perform the functions they were authorized to perform immediately prior to the [Treasury] Reorganization Plan [effective July 31, 1950] and authorized regulations and procedures in effect immediately prior to the effective date of the Reorganization Plan shall continue in effect *until changed by the appropriate authority.*" (Emphasis supplied.)

However, the 1953 Order, issued by Secretary of the Treasury Humphrey, as the majority has held, did not include any authority to discharge and it thus "changed by appropriate authority", the "authorized regulations and procedures in effect" under the provisions of the 1950 and 1946 Orders.

Moreover, prior to the 1953 Order, Personnel Circular No. 109 (Revised), dated March 1, 1951, which it specifically incorporated by reference, delegated to Heads of Bureaus certain personnel powers *excluding* those stated in Paragraph 4 of that Circular, and included in such ex-

clusions was "Separations". Thus, the situation which obtained under the 1951 Personnel Circular made it mandatory for all Separations to receive "prior approval of the Department."

Since Secretary Humphrey's 1953 Order did not include "Separations" in his new delegations to the Commissioner of Internal Revenue, and further included by specific reference the 1951 Personnel Circular which excluded "Separations" without prior approval by the Secretary of the Treasury, the District Director was without authority in the instant case to dismiss the appellant.

It is clear from the foregoing that the 1953 Personnel Circular, issued by the Director of Personnel eleven days after the promulgation of Secretary Humphrey's 1953 Order, was an attempted usurpation of authority by a subordinate and its unauthorized "delegation" of dismissal powers to the District Director was invalid.

For reasons stated I would reverse the judgment of the District Court and remand with instructions to enter judgment in favor of the appellant.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,812.

ELEANOR ZIRIN,
Appellant

vs.

E. A. McGINNES, District Director
of Internal Revenue.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: BIGGS, *Chief Judge*, GOODRICH, McLAUGHLIN, KALODNER, STALEY, HASTIE AND FORMAN, *Circuit Judges*.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
HARRIET G. HUMPHRYS,
Chief Deputy Clerk.

August 1, 1960.

LE COPY

FILED
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JAMES R. BROWNING, Clerk

No. 513

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELEANOR ZIRIN, PETITIONER

v.

E. A. MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Solicitor General,

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Assistant Attorney General,

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MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

After having received notice of unsatisfactory service, an unsatisfactory performance rating, and an opportunity to answer the charges, petitioner was discharged by the District Director of Internal Revenue from her position as a window teller in the Internal Revenue Service at Philadelphia, Pennsylvania. Appeals were denied successively by the Performance Rating Board of Review, the Regional Com-

missioner of Internal Revenue, the Commissioner of Internal Revenue, the Civil Service Commission, and the Board of Appeals and Review of the Civil Service Commission.

In an action for reinstatement, petitioner contended that authority to discharge employees had never been delegated from the Secretary of the Treasury to the Commissioner of Internal Revenue, and hence that the Commissioner's purported delegation of such authority to the District Director was ineffective. The district court held that Treasury Department Order 150-27 (Pet. 34) impliedly made such a delegation to the Commissioner. The court of appeals construed that Order as not including separation powers and, in its original decision, reversed (Pet. 39-44). On rehearing *en banc*, the court's attention was called to other outstanding departmental orders and directives —in particular, Supplement 5 to Personnel Circular 109 (Pet. 34-35)—which the court held did contain the necessary delegation (Pet. 46-56).

The court of appeals' decision *en banc* is, we believe, plainly correct, but in any event the interpretation of internal departmental directives is not a question appropriate for review by this Court. Petitioner also objects to the Government's reliance on rehearing upon directives which had not been relied upon in the district court and to the court of appeals' taking judicial notice of those directives. An appellee, however, is entitled to defend its judgment on any ground supported by the record or susceptible of judicial

notice, whether or not raised in the trial court,[1] and judicial notice has frequently been taken of reports and publications of Government agencies of no greater dignity than the orders and circulars involved here,[2] the authenticity of which, moreover, petitioner has never questioned.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

ALAN S. ROSENTHAL,
W. HAROLD BIGHAM,
Attorneys.

NOVEMBER 1960.

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[1] See, *e.g.*, *LeTulle* v. *Scofield*, 308 U.S. 415; *Langnes* v. *Green*, 282 U.S. 531; *United States* v. *American Ry. Express Co.*, 265 U.S. 425; *Standard Accident Ins. Co.* v. *Roberts*, 132 F. 2d 794 (C.A. 8). In *Commissioner* v. *Belridge Oil Co.*, 267 F. 2d 291 (C.A. 9), and *General Utilities & Operating Co.* v. *Helvering*, 296 U.S. 200, cited by petitioner (Pet. 15, 16), the appellant was attempting to obtain a *reversal* of a judgment on a ground not presented to the district court.

[2] See, *e.g.*, *New York Indians* v. *United States*, 170 U.S. 1, 32; *Caha* v. *United States*, 152 U.S. 211, 221; *Fletcher* v. *Jones*, 105 F. 2d 58 (C.A.D.C.); *Chas. C. Steward Mach. Co.* v. *Davis*, 89 F. 2d 207, 210 (C.A. 5) affirmed, 301 U.S. 548; *Nev-Cal Electric Securities Co.* v. *Imperial Irrigation Dist.*, 85 F. 2d 886, 905 (C.A. 9). Cf., *Minnesota* v. *United States*, 305 U.S. 382, 390; *A.T.&T. Co.* v. *United States*, 299 U.S. 232, 240-241.

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